In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Nos. 16-3328, 16-3509

SOUTHERN BAKERIES, LLC,
Petitioner / Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent / Cross-Petitioner.

On Petition for Review from the National Labor Relations Board

---

PETITIONER/CROSS-RESPONDENT'S PETITION FOR REHEARING *EN BANC*

David L. Swider
Sandra Perry
Philip R. Zimmerly
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5000; (317) 684-5173 (Fax)
DSwider@boselaw.com
SPerry@boselaw.com
PZimmerly@boselaw.com

Counsel for Petitioner / Cross-Respondent, Southern Bakeries, LLC

Table of Contents

Table of Authorities

Page

Cases

Federal Statutes

Petitioner/Cross-Respondent Southern Bakeries, LLC ("SBC"), pursuant to Fed. R. App. P. 35 and 40 and Eighth Circuit Rules 35A and 40A, respectfully requests a rehearing *en banc* of the Panel's September 27, 2017 decision. SBC requests the rehearing with respect to the Panel's decision (1) that SBC caused a majority of employees to disfavor and reject the Bakery, Confectionary, Tobacco and Grain Millers Union, Local 111 ("Union"), and (2) that certain campaign statements by SBC were unlawful and unprotected by the First Amendment.

STATEMENT UNDER FED. R. APP. P. 35(b)(1)

En banc review is appropriate to maintain and secure uniformity of decisions within this Circuit, and because this case involves questions of exceptional importance to employees, employers and unions who litigate labor law matters in this Circuit. In particular, this matter is of primary importance to a majority of SBC employees who repeatedly tried to rid themselves of an incumbent union, by submitting a decertification petition signed by 59% of the employees in May 2012 and then submitting a withdrawal petition signed by 132 employees (66%)

in July 2013. Forcing them back into an agency relationship they overwhelmingly rejected contradicts their free will, their rights of association, and the express purpose of the National Labor Relations Act. The three issues for *en banc* review are:

1. Does the Panel majority's decision that SBC caused the employees' disfavor for the Union behind the May 2012 decertification petition conflict with this Court's decision in *McKinney ex rel. NLRB v. Southern Bakeries, LLC*, 786 F.3d 1119, 1124 n.5 (8th Cir. 2015), which addressed the exact same evidence and found that the NLRB "has not pointed to evidence suggesting the 2012 petition is not a genuine reflection of employee sentiment"?

2. Did the Panel majority err in finding that the employees' May 2012 decertification petition was caused by SBC's denial of access to one union representative, where the timing and nature of that denial does not indicate any lasting effect on employees, employees were not aware of the access dispute, and affirmative evidence shows that the decertification petition was disseminated for other reasons.

3. Did the Panel majority err in its application of the Supreme Court precedent in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), by

imposing a "carefully phrased" requirement on all campaign speech involving predictions, in interpreting campaign statements as threats or promises where they did not describe any action the speaker would take, and by finding unlawful a neutral harassment-reporting request.

INTRODUCTION

A primary purpose of the NLRA is to protect workers' choice of their bargaining representative. 29 U.S.C. § 151. The Panel majority's decision imposes the Union on a majority of bargaining unit employees who worked over a year-and-a-half to rid themselves of the Union, and who have now freely represented themselves for the past four years. This decision conflicts with *McKinney ex rel. NLRB v. Southern Bakeries, LLC*, 786 F.3d 1119 (8th Cir. 2015), and misapplies the four-factor analysis from *Master Slack Corp.*, 271 NLRB 78 (1984), because there is no causal nexus between the employees' rejection of the Union and the unfair labor practices ("ULPs") alleged against SBC.

As Judge Gruender noted in dissent, "Eighth Circuit precedent confirms pre-ULP loss of majority support" by the Union. (Op.38.) "[D]ating back to 2009, SBC workers struggled to oust the Union with steadily growing momentum. This undisputed history demonstrates the

Union lost majority support prior to May 2012." (*Id.*) The Panel majority's decision "protects a union at the expense of employees." (Op.21.) "Rather than checking this agency overreach, the [Panel majority's] decision . . . rubber-stamps a bargaining order that sacrifices the will of employees for the sake of union incumbency." (Op.44.)

The Panel majority's decision also conflicts with Supreme Court precedent with regard to its finding that SBC's campaign statements were unlawful and unprotected by the First Amendment.

Rehearing *en banc* is necessary to remedy these conflicts and to address these issues of exceptional importance.

FACTUAL BACKGROUND PERTINENT TO PETITION

SBC is a commercial bakery in Hope, Arkansas, that opened in 2005, when SBC hired a majority of former employees from Meyer's Bakeries, and voluntarily recognized the Union as the collective bargaining agent for its production and sanitation employees. (JA1423.)[1] SBC negotiated three collective bargaining agreements ("CBA") with the Union, the last of which expired in February 2012. (*Id.*)

[1] "JA" references the Joint Appendix.

On December 7, 2011, a majority of bargaining unit employees filed a petition informing the NLRB they no longer wished to be represented by the Union.[2] The Union responded by filing multiple ULP charges against SBC, blocking the decertification election. (JA1423.)

On May 23, 2012, the employees filed another decertification petition spearheaded by employee John Hankins ("Hankins") and again signed by a majority (59%) of employees. (JA1424; JA350.) The requested election was scheduled for February 7, 2013. (JA1413, JA148.)

On March 23, 2012, Union representative Cesar Calderon was banned from the facility pending SBC's investigation into an employee complaint of unwanted physical contact. (JA1424.) Calderon was the only Union representative subject to this ban, and his right of access was restored in October 2012 under a settlement agreement. (*Id.*; JA258-59.) There is no evidence that any other union representative was denied access to SBC's facility from March 23 to May 23, 2012.

In early 2013, the Company held captive audience meetings during the election period. (JA1425-27; JA570-966.) Due to additional

[2] Brief for Petitioner-Appellee NLRB at 44, *McKinney v. Southern Bakeries, LLC*, No. 14-3017, 2014 WL 6746856 (8th Cir. 2014).

blocking charges by the Union, the election scheduled for February 7, 2013, was never held. (JA1424.)

With no election date in sight, Hankins went online to find another way to eliminate the Union, and he came across the National Right to Work Foundation website. (JA352-53.) He called the Foundation and received information about filing a withdrawal petition. (JA353.)

From May 31 through June 12, 2013, Hankins gathered 132 signatures on the withdrawal petition. (JA1430 & n.27; JA353-54, JA1161-72.) The bargaining unit consisted of approximately 200 employees (JA1423; JA438-41), only 68 of whom were dues-paying Union members. (JA1189.) The 132 signatures represented 66% of the bargaining unit—and nearly twice the number of Union members. Management had no involvement in the process. (JA355.)

Hankins presented the petition to SBC on June 13, 2013, declaring that employees were frustrated they were still being denied an election. (JA1430, 268, 351, 354-55.) SBC verified the signatures and withdrew recognition of the Union on July 3, 2013. (JA1430-31, 268-69.)

Again, the Union filed a series of ULPs. While the case was pending before an administrative law judge, the Regional Director filed for 10(j) injunctive relief. *See McKinney ex rel. NLRB v. Southern Bakeries, LLC*, 786 F.3d 1119, 1121 (8th Cir. 2015). On August 14, 2014, the District Court for the Western District of Arkansas entered a preliminary injunction, reinstalling the Union. *Id.* at 1122.

SBC appealed the issuance of the injunction, and this Court vacated it. *Id.* at 1126. This Court opined that "the unrefuted evidence before us indicates a majority of [SBC's] employees have not supported the Union since at least May 2012 when Hankins circulated his first petition." *Id.* at 1124. Thus, reinstating the Union did not preserve the *status quo* "[b]ecause the Union had long been out of favor." *Id.* at 1125.

ARGUMENT

I. The Panel majority's decision conflicts with this Circuit's prior decision in *McKinney ex rel. NLRB v. Southern Bakeries, LLC*.

The crux of this appeal, like the prior appeal of the 10(j) injunction, hinges on whether the employees' decision to reject the Union was caused by SBC's alleged wrongdoing, or whether it sprung from the employees' own free will. "Under Board law, if a union actually has lost majority support, the employer must cease recognizing it . . . ."

Levitz Furniture Co., 333 NLRB 717, 724 (2001). "[T]he Board has the burden of adducing substantial evidence to support its finding that an employer's unfair labor practices have 'significantly contributed' to the erosion of a union's majority support." *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 648 (D.C. Cir. 2013).

The sole piece of evidence cited by the Panel majority to find that SBC caused a majority of employees to sign the May 2012 petition relates to the change in meeting space and denial of access to one Union representative, Calderon, in late March 2012. (Op.21.) But the Panel majority's finding of a causal nexus directly conflicts with this Court's decision in *McKinney* – which addressed the very same evidence and found none. In that appeal, the district court cited the Calderon access evidence, *McKinney ex rel. NLRB v. Southern Bakeries, LLC*, 38 F. Supp. 3d 1019, 1025 (W.D. Ark. 2014), and both sides referenced it in their appellate briefing. (Brief for the Appellant at 6, *McKinney v. Southern Bakeries, LLC*, No. 14-3017, 2014 WL 5421963; Brief for Petitioner-Appellee NLRB at 6, 2014 WL 6746856.) The *McKinney* Court found it failed to establish a causal nexus: "[T]he Director has not pointed to evidence suggesting the 2012 petition is not a genuine

reflection of employee sentiment." 786 F.3d at 1124 n.5. This was corroborated by the Board's reaction to the 2012 petition, as "[it] scheduled an election for February 7, 2013." *Id.*

Reaching the opposite determination, the Panel majority cited this Court's decision in *McKinney* (Op.20-21), but concluded that "[o]n its current appeal, however, the Board has produced evidence that the company first limited—then barred—union access to the bakery during the two months before the May 2012 decertification petition." (Op.21). This suggests that, in this appeal, the Board produced new evidence to reach a different result. But this finding is incorrect and incompatible with *McKinney*. ***The evidence is the same***. There is absolutely no new evidence relating to the May 2012 decertification petition that would allow the Panel majority to reach the opposite conclusion about the genuineness of employee sentiment.[3]

Judge Gruender's dissent recognized this shortcoming in the Panel majority's decision, noting that "Eighth Circuit precedent confirms pre-ULP loss of majority support." (Op.38.) As Judge Gruender

[3] There was evidence relating to employee discipline in 2013 included in this appeal that was not cited in the *McKinney* appeal, but logically such discipline could not have caused employee disfavor in May 2012.

correctly noted, "dating back to 2009, SBC workers struggled to oust the Union with steadily growing momentum. This undisputed history demonstrates the Union lost majority support prior to May 2012. The Board failed to adequately address this adverse evidence, thereby calling into question its causal determination." (*Id.*)

The two results in these decisions cannot be reconciled. "[A] panel decision that conflicts with past decided cases is appropriate for a rehearing en banc." *Bressman v. Farrier*, 900 F.2d 1305, 1318 n.21 (8th Cir. 1990) (Heaney, J., concurring and dissenting). Accordingly, SBC respectfully requests that its petition for *en banc* review be granted.

II. The Panel majority erred in holding that the short-term denial of access to one union representative caused the employees to reject the Union and required the imposition of a bargaining order.

The conflict between the Panel majority and the *McKinney* decision highlights that the Calderon access dispute is not enough to satisfy the four *Master Slack* factors. This issue is one of exceptional importance, as the Panel majority allowed this one alleged wrong by SBC to supersede the repeated efforts of over one hundred employees and to force those employees back into an agency relationship they have consistently rejected. As Judge Gruender wrote in dissent: "The wrongs

of the parent should not be visited on the children, and the violations of [this employer] should not be visited on these employees." (Op.22 (quoting *Overnite Transp. Co.*, 333 NLRB 1392, 1398 (2001) (Member Hurtgen, dissenting)).

"[W]here the unfair labor practices do not involve a general refusal to recognize and bargain with the union, 'there must be specific proof of a causal relationship between the unfair labor practice[s] and the ensuing events indicating a loss of support.'" *Champion Enters.,* 350 NLRB 788, 791 (2007) (citation omitted). In determining whether a causal relationship exists, the Board considers: "(1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union." *Id.* (citing *Master Slack*, 271 NLRB at 84).

Here, as Judge Gruender noted, even if the Calderon restriction was a ULP (and it was not), the evidence is insufficient to show the Union lost majority support "simply because one of its representatives

was absent for a few weeks." (Op.39.) Rather, this short-term denial of access to one union representative is not a "hallmark violation" that would coerce a majority of employees to reject the Union or that should override their free choice.

The four *Master Slack* factors fail to establish any linkage between this alleged ULP and the employee sentiment reflected in the decertification petition. First, two months passed between Calderon's dismissal and the decertification petition's submission. This time span gives no hint of any causal nexus.

Second, barring access to one individual would not have a detrimental or lasting impression on over one hundred employees, as there is no evidence they were even aware of this minor dispute.

Third, this short-term ban on one person would not be expected to impact employees' feelings toward the Union absent evidence to the contrary. And there is none in this case. *Cf. Tenneco*, 716 F.3d at 649-50 (refusal to provide replacement employees' addresses, requiring supervisor permission before posting materials in facility, and discipline of union advocate were "hardly hallmark violations that were highly

coercive and likely to remain in the memories of employees for a long time" (citation omitted)).

Fourth, there is no evidence that Calderon's ban "resulted in 'detrimental or lasting' effects sufficient to cause a large majority of the employees to sign a decertification petition," *id.* at 650-51, especially where (1) there is no evidence that *the Union* (as opposed to one individual) was denied access to assist bargaining unit employees; (2) there was no evidence that Calderon's ban "actually prevented communications between the employees and the Union," *id.*; (3) there is no evidence that employees even knew (or cared) that Calderon was temporarily banned; (4) union meetings were historically held off site anyway (JA167); and (5) there was no evidence employees were negatively affected.

Importantly, the percentage of employees (59%) who signed the decertification petition to divest themselves of the Union in May 2012 is strikingly similar to the percentage who signed the withdrawal petition in June 2013 (66%). (JA350, 1430 n.28.) These percentages match the percentage of employees who chose not to pay Union dues (66%). (JA1189 (only 68 of 199 employees (34%) paid Union dues).) The NLRB

also admitted that a majority of employees signed a decertification petition in December 2011. (*Supra* n.2.)

The Panel majority also ignored the testimony of Hankins, the only employee called at the administrative hearing to testify about the decertification and withdrawal petitions. Hankins said he prepared the decertification petition because the Union had proved ineffective in getting raises for employees and because he wanted to deal with the Company directly. (JA350-52.) Hankins rejected any suggestion that employee efforts were sparked by SBC. (JA356-57.) Yet, the NLRB and the Panel majority ignored his input entirely even though the General Counsel, which bore the burden of proof, called no employees to contradict him. *Cf. Tenneco*, 716 F.3d at 652 (finding NLRB erred when it "simply ignored the signing employees' testimony without any explanation").

The harm to the workers and SBC by reinstating the Union is significant and underscores that *en banc* review is necessary to take up this issue of exceptional importance. SBC should be under no obligation to continue bargaining with a union the majority of appropriate-unit employees have rejected. "[I]f a union actually has lost majority

support, the employer must cease recognizing it . . . ." *Levitz*, 333 NLRB at 724. Ignoring this key tenet, the Panel majority has allowed the Board to silence the employees from speaking for themselves and forced them to cede control over their working lives to a representative they have consistently rejected.

III. The Panel majority's decision relating to the lawfulness of SBC's campaign statements contradicts U.S. Supreme Court precedent and the First Amendment.

Another issue of exceptional importance concerns whether SBC's campaign statements were unlawful, an issue that led to 2-1 decisions by the NLRB and the Panel. "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Gissel*, 395 U.S. at 617. "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* at 618. This issue is critical in this case because it underpins the only possible "hallmark" violations of the NLRA sufficient to taint employee sentiment enough to impose a bargaining order on employees who consistently eschewed

Union representation. *Tenneco*, 716 F.3d at 650 (noting "hallmark violations" are those "types of violations that have detrimental and lasting effects . . . such as discharge, withholding benefits, and threats to shutdown the company operation").

A. The Panel majority erroneously imposed *Gissel's* "carefully phrased" requirement on all campaign speech involving "predictions."

The Panel majority erred in holding that any predictions regarding the effects of unionization must be "carefully phrased on the basis of objective fact" under *Gissel*. (Op.8.) As explained in Judge Gruender's dissent, this heightened standard of review is not appropriately applied to all campaign statements, but only to those where a company predicts the "precise effects" it believes unionization will have on the company. (Op.28-29.) Otherwise, as the D.C. and Sixth Circuits have held, general observations about how unions can affect a company's ability to compete does not trigger the "carefully phrased" standard. (Op.29 (citing *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1174 (D.C. Cir. 1998); *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 369 (6th Cir. 1993), *abrogated on other grounds by Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996)).

Further, as Judge Gruender recognized, "[f]or a statement to constitute a threat, it must at least purport to describe an action *the speaker or author* of the statement may take." (Op.30 (quoting *S. Bakeries, LLC*, 364 NLRB No. 64, at *12 (2016) (Member Miscimarra, dissenting in part)). "[E]mployees may not reasonably conclude that they are being coerced where the opinions refer to matters over which the speaker has no control." *Pentre*, 998 F.2d at 369.

The Panel majority misapplied *Gissel* in finding it unlawful to tell employees that unions had "strangled" companies in several industries, and that a collective bargaining agreement did not guarantee a company's or employees' longevity. (Op.8-9). This was permissible campaign propaganda, easily identified by employees as such. Accurately explaining to employees that a CBA is not a guarantee of future employment is not unlawful.

The Panel majority also misread this Court's decision in *NLRB v. Noll Motors, Inc.*, 433 F.2d 853, 854 (8th Cir. 1970). In *Noll*, the employer told employees that if the shop was unionized, he would "operate the shop 'on a strictly production basis,' and he was sure that all the men could not make out on such an arrangement." *Noll Motors,*

Inc., 168 NLRB 1029, 1030 (1967). This statement was one of a precise effect within the employer's control – the shop *would be* operated on a production basis and the employer was *sure* that not all employees would make it.

SBC made no such threats of any actions that it would take. Rather, the Panel majority improperly discounted numerous statements that SBC would continue to work with employees regardless of the election outcome. (*See, e.g.*, JA575 ("Whether the union continues to represent you after the election vote or not, we will still be working together."); JA623 ("I want to stress that if the union were somehow to win the election and continue to represent you, we wouldn't reduce wages, benefits, or working conditions just because the union won.")).

The Panel majority also erred in finding that SBC promised benefits if employees decertified the Union. (Op.10.) As Judge Gruender recognized, an employer may lawfully explain the costs associated with a union (*e.g.*, in collective bargaining, adjusting of grievances, and related legal fees) that a company must recover from its revenue that can reduce what is available for employee wages and benefits in bargaining. (Op.32-33.) SBC never told employees they would receive

raises if they rejected the Union, just that there are costs associated with unionization that factor into what is available for wages. This is a factual reality based on demonstrable consequences largely outside the control of SBC, not a promise or threat. (*Id.*)

In sum, SBC's campaign propaganda includes no threat of job loss or closure or promise of benefits, either express or implied. The standard applied by the Panel majority contradicts *Gissel* and improperly silences a fair exchange of ideas.

B. SBC's neutral statement against harassment in the workplace was not unlawful.

The Panel majority also erred in finding that SBC acted unlawfully in reminding employees that on-the-job harassment and threats were prohibited, and that employees were entitled to protection "regardless of whether you are for or against the union . . . just as we have always." (Op.10-12.)

This statement recognizes that employee fervor on either side of the union question could easily broil into impermissible conduct and aligns completely with laws protecting employees against harassment and threats in the workplace. *Martin Luther Mem. Home, Inc.*, 343 NLRB 646, 648-49 (2004) (rule prohibiting harassment was lawful

because "employees have a right to a workplace free of unlawful harassment").

SBC expressed to employees that they should report harassment or threats so that the Company could address the problem "just as we always have." (JA576.) In this way, SBC simply reiterated the company's longstanding policy—set out in its employee handbook—against "any form of harassment in the workplace." (JA496.)

As Judge Gruender recognized in dissent, this Court should "not require employers to hesitate before acting to maintain order in the workplace for fear of being held to task by the Board." (Op.34.) By improperly penalizing SBC's invitation to report harassment and threats, the Panel majority's decision unreasonably limits the right of employees to protection from harassment based on their sentiments regarding union representation and unreasonably limits the right of employers to address such harassment. (*S. Bakeries*, 364 NLRB No. 64, at *11 (Member Miscimarra, dissenting in part)).

CONCLUSION

SBC respectfully requests that the Court grant the requested rehearing *en banc* because the Panel majority's decision conflicts with a prior decision of this Court, misapplies applicable law, and the subject matter is of exceptional importance for consistent national labor law policy. At its base, the Panel majority's decision enforces an NLRB Order that supersedes the free choice of a majority of employees who voted to withdraw support from the Union, and subjects them to a bargaining relationship they have consistently rejected.

Respectfully submitted,

s/*David L. Swider*
David L. Swider
Sandra Perry
Philip R. Zimmerly
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
317-684-5000; 317-684-5173 (Fax)
DSwider@boselaw.com
SPerry@boselaw.com
PZimmerly@boselaw.com

Counsel for Petitioner / Cross-Respondent, Southern Bakeries, LLC

Certificate of Compliance

This petition for rehearing complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,883 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional typeface using Microsoft Word 2010 Century font face in font size 14.

This petition has been scanned for viruses and is virus-free.

s/*David L. Swider*
David L. Swider

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2017, I electronically filed the foregoing "Petitioner/Cross-Respondent's Petition for Rehearing *En Banc*" with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and were served through the CM/ECF system.

Linda Dreeben Robert Englehart Micah Jost National Labor Relations Board 1015 Half Street SE Washington, DC 20570-0001 appellatecourt@nlrb.gov Robert.Englehart@nlrb.gov Micah.jost@nlrb.gov	M. Kathleen McKinney Linda M. Mohns Zachary Herlands Caitlin Bergo National Labor Relations Board Region 15, Subregion 26 80 Monroe Avenue, Suite 350 Memphis, TN 38103 m.kathleen.mckinney@nlrb.gov linda.mohns@nlrb.gov zachary.herlands@nlrb.gov caitlin.bergo@nlrb.gov

s/*David L. Swider*
David L. Swider

3294532